DRN-5373638

The complaint

Mrs F and the estate of Mr F's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to unfair credit relationships with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mrs F and the late Mr F were existing customers of a timeshare provider (the 'Supplier') and between September 1994 and September 2011, they had purchased 54,000 points in the Supplier's 'European Collection'. These points worked like a currency such that, every year, Mrs F and the late Mr F could use the points to stay at the Supplier's holiday accommodation. That accommodation 'cost' different amounts of points depending on the size of the apartment, its location and the time of year.

On 8 July 2013 (the 'Time of Sale 1'), Mrs F and the late Mr F made their first purchase of a new type of timeshare membership (the 'Fractional Membership') from the Supplier. They entered into a Purchase Agreement with the Supplier to buy 11,000 'fractional points', trading in 11,000 of their existing points from their 'non-fractional' European Collection membership towards this (the 'Purchase Agreement 1'). This was at a cost of £6,372, with a conversion price given for their European Collection points of £1 per point.

Mrs F and the late Mr F paid for their Fractional Membership by taking finance of £6,372 from the Lender in both of their names (the 'Credit Agreement 1').

In January 2014, Mrs F and the late Mr F made a further purchase of Fractional Membership, trading in a further 7,500 of their European Collection points for 7,500 fractional points with the Supplier. This purchase was funded by a loan with another lender in the late Mr F's sole name, and a complaint about this sale and loan is being dealt with in a separate decision.

On 6 July 2014 (the 'Time of Sale 2'), Mrs F and the late Mr F made a further purchase of Fractional Membership with the Supplier. This was to buy 8,000 fractional points, trading in another 8,000 of their existing European Collection points towards this (the 'Purchase Agreement 2'). This was at a cost of £4,884, also with a conversion price of £1 per European Collection point.

Again, Mrs F and the late Mr F paid for their Fractional Membership by taking finance of £4,884 from the Lender in both of their names (the 'Credit Agreement 2').

In April 2015, Mrs F and the late Mr F made a further purchase of Fractional Membership, trading in a further 4,000 of their European Collection points for 4,000 fractional points with the Supplier. This purchase was also funded by a loan from the Lender but was in the late Mr F's name only, so a complaint about this sale and loan is also being dealt with in a separate decision.

Fractional Membership was asset backed – which meant it gave Mrs F and the late Mr F more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreements (the 'Allocated Property') after their membership term ends.

In January 2016, Mrs F and the late Mr F relinquished their remaining 23,500 European Collection points to the Supplier. In November 2016, they engaged the service of a timeshare termination company. And, in March 2017, ownership of Mrs F and the late Mr F's Fractional Membership points (30,500 in total) was transferred to a third party, which I'll address in more detail later.

Mrs F and the late Mr F – using a professional representative (the 'PR') – wrote to the Lender on 27 March 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Times of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Times of Sale

Mrs F and the late Mr F said that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Membership had a guaranteed end date when that was not true.
2. told them that Fractional Membership was an "investment" when that was not true.

Mrs F and the late Mr F said that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs F and the estate of Mr F.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mrs F and the late Mr F said that the credit relationships between them and the Lender were unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The contractual terms which allowed the Supplier to terminate the membership and keep any money already paid if Mrs F and the late Mr F failed to make a payment required under the Purchase Agreements, were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. The Credit Agreement(s) were unenforceable because they were not arranged by a credit broker regulated by either the Office of Fair Trading ('the 'OFT') or the Financial Conduct Authority (the 'FCA') to carry out such an activity.
3. The decision(s) to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mrs F and the late Mr F's concerns as a complaint and issued its final response letter on 22 May 2019, rejecting it on every ground.

Mrs F and the late Mr F then referred the complaint to the Financial Ombudsman Service.

In 2021, ownership of the Fractional Membership was again transferred to another, different third party (and has remained with that other third party since then).

In March 2023, Mr F sadly passed away and the PR made our Service aware of this on 3 May 2023 and as such the complaint is now brought by his estate.

The complaint was then assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

There was some confusion at this point as which sales were being addressed under this particular complaint reference. We've now clarified this with both parties separately and this decision addresses the purchases at Time of Sale 1 and Time of Sale 2 as I've outlined above.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I considered the matter and issued a provisional decision dated 17 February 2025. In that decision, I said:

"***The legal and regulatory context***

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*

- *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75 of the CCA: the Supplier's misrepresentations at the Times of Sale

The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mrs F and the estate of Mr F could make against the Supplier. As outlined above, this complaint involves two purchases, so in effect there are two separate claims here. However, as the complaint points and evidence for both are the same, I don't see any point in repeating my findings twice. So, while considering each claim separately, I've set out my findings here largely as one.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mrs F and the late Mr F at the Times of Sale, the Lender is also liable.

The PR said the Supplier told Mrs F and the late Mr F that Fractional Membership had a guaranteed end date when that was not true. Given that Mrs F and the late Mr F transferred ownership of their Membership several years ago, I'm unsure of the relevance of this point. But in any event, I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be

sold at the conclusion of the contract period. The Terms and Conditions generally set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mrs F and the late Mr F were included.

In addition, the PR also said in the letter of complaint that the Supplier told Mrs F and the late Mr F that Fractional Club membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mrs F and the late Mr F's memberships plainly did have an investment element to them.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mrs F and the late Mr F by the Supplier at the Time(s) of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they alleged.

For these reasons, therefore, I do not think the Lender is liable to pay Mrs F and the estate of Mr F any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claims in question.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

I have already explained why I am not persuaded that the contracts entered into by Mrs F and the late Mr F were misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mrs F and the estate of Mr F also say that the credit relationships between them and the Lender were unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Times of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether either of the credit relationships between Mrs F and the late Mr F and the Lender were unfair. Again, this complaint involves two purchases and two separate credit relationships. However, again, as the complaint points and evidence for both are the same, I don't see any point in repeating my findings twice. So, while I have considered each of the credit relationships separately, I've set out my findings here largely as one.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sales of Mrs F and the late Mr F's Fractional Memberships were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator

and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of both of the credit relationships between Mrs F and the late Mr F and the Lender along with all of the circumstances of the complaint and I do not think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Times of Sale; and*
2. *The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;*
4. *The inherent probabilities of the sale given their circumstances.*

I have then considered the impact of these on the fairness of the credit relationships between Mrs F and the late Mr F and the Lender.

<u>The Supplier's sales & marketing practices at the Times of Sale</u>

Mrs F and the late Mr F's complaint about the Lender being party to unfair credit relationships was also made for several reasons, all of which I set out at the start of this decision.

The PR says that the right checks weren't carried out before the Lender lent to Mrs F and the late Mr F. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend at either Time of Sale (and I make no such finding), I would have to be satisfied that the money lent to Mrs F and the late Mr F was actually

[1] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationships with the Lender were unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mrs F and the late Mr F. If there is any further information on this (or any other points raised in this provisional decision) that Mrs F and the estate of Mr F wish to provide, I would invite them to do so in response to this provisional decision.

I'm not persuaded, therefore, that either of Mrs F and the late Mr F's credit relationships with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationships with the Lender were unfair to them. And that's the suggestion that Fractional Membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way. And, this is the reason why the Investigator in this case upheld the complaint.

Was Fractional Membership marketed and sold at the Times of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mrs F and the late Mr F's Fractional Memberships met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Membership as an investment. This is what the provision said at the Times of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says that the Supplier did exactly that at the Times of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mrs F and the late Mr F's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Membership. They just regulated how such products were marketed and sold.

To conclude, therefore, that either or both of the Fractional Memberships were marketed or sold to Mrs F and the late Mr F as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing Fractional Membership as an 'investment' or quantifying to prospective purchasers, such as Mrs F and the late Mr F, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork for both sales that state that Fractional Membership was not sold to Mrs F and the late Mr F as an investment.

With all of that said, I accept that it's possible that Fractional Membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Membership without breaching the relevant prohibition.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Times of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

Were the credit relationships between the Lender and Mrs F and the late Mr F rendered unfair?

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs F and the late Mr F and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mrs F and the late Mr F, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

I explained above that ownership of all of Mrs F and the late Mr F's Fractional Memberships were transferred to a third party in March 2017. And ownership of all the memberships was again transferred to another third party in 2021.

I asked both the Supplier (via the Lender) and the PR for some further information about this, and I think it's relevant to explain that in more detail here.

As previously mentioned, the PR has explained that Mrs F and the late Mr F engaged the services of a timeshare termination company in November 2016 and said, in essence, that instead of terminating the memberships, they were simply transferred to a third party. And, they say that Mrs F and the late Mr F did not know either of the third parties that ownership was transferred to in 2017 and 2021. However, they said that Mrs F and the late Mr F continued to pay the loans from their joint account, including after Mr F's death. They also said Mrs F and the late Mr F did not receive any money from either of the third parties when ownership was transferred, or profit from the transfer in any way.

However, from information provided by the Supplier in this case, they were never contacted by the timeshare termination company whose services Mrs F and the late Mr F engaged. The Supplier has said the third party the memberships were transferred to in March 2017 was Mrs F's sister (and another individual). And, the third party they were subsequently transferred to in 2021 was known to the previous individuals and therefore potentially Mrs F as well.

So, based on the information I currently have, I don't think it's correct to say that Mrs F and the late Mr F did not know the third parties who took over ownership of the memberships. And, I also don't therefore think it's likely that there wasn't any kind of discussion, at least in 2017, between Mrs F and the late Mr F and the third parties at that time, including in relation to who'd be paying for both the membership-related fees and the loans following the transfers of ownership.

But in any event, if Mrs F and the late Mr F purchased the memberships at the Times of Sale because they thought they were an investment and they would make a financial gain from them, I struggle to understand why they would then transfer ownership of all their memberships just a few years later, apparently for no financial return, thereby entirely giving up the entitlement they had to the net proceeds of the sale of the Allocated Property i.e. the potential to receive any profit.

Further, in their testimony, when explaining why they had become unhappy with the memberships and what led to their complaint being made, they've highlighted that they were still having to pay the loans and the financial pressure of these had increased due to subsequent changes in their circumstances (ill health and a reduced income) and they were therefore unable to afford to take the same types of holidays abroad that they used to. And, that they couldn't relinquish Fractional Membership in the same way as they did with their remaining European Collection points. So, I'm not persuaded from their testimony that the investment elements of the memberships were important to them.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs F and the late Mr F's decision to purchase Fractional Membership at either of the Times of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think either of the credit relationships between Mrs F and the late Mr F and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Times of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs F and the late Mr F when they purchased Fractional Membership at the Times of Sale. But they and the PR said that the contractual terms allowing the Supplier to terminate membership where Mrs F and the late Mr F failed to pay their annual management fees were unfair.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

To conclude that a term in the Purchase Agreements rendered the credit relationship(s) between Mrs F and the estate of Mr F and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR, and that the term was actually operated against Mrs F and the late Mr F in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs F and the late Mr F and/or his estate, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mrs F and the late Mr F have led to any unfairness in the associated credit relationships with the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement(s) were actually operated against Mrs F and the late Mr F, let alone unfairly.

So, I'm not persuaded that either of the credit relationships was rendered unfair to them for this reason.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think either of the credit relationships between the Lender and Mrs F and the late estate of Mr F were unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

The complaint about the Credit Agreements being unenforceable because they were arranged by a credit broker that was not regulated by the OFT or FCA to carry out that activity

Mrs F and the estate of Mr F say that the Credit Agreements were arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreements as a result.

However, having looked at the Financial Ombudsman Service's internal records and the FCA register, I can see that the entity named on the Credit Agreement 1 as the credit intermediary did hold, at the Time of Sale 1, a Consumer Credit Licence issued by the Office of Fair Trading. And in the absence of any evidence to suggest that its Licence did not cover credit broking, I am not persuaded that the Credit Agreement 1 was arranged by an unauthorised credit broker.

Similarly, I can see that the entity named on the Credit Agreement 2 as the credit intermediary was, at the Time of Sale 2, authorised by the FCA for credit broking. And again, in the absence of any evidence to suggest that it was not authorised for the activity of credit broking, I am not persuaded that the Credit Agreement 2 was arranged by an unauthorised credit broker either."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mrs F and the late Mr F's Section 75 claims, and I was not persuaded that the Lender was party to a credit relationship with Mrs F and the estate of Mr F under either of the Credit Agreements that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs F and the estate of Mr F.

Neither party responded to my provisional decision, nor did they provide any further evidence or arguments that they wished to be considered.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

My final decision

For these reasons, I do not uphold Mrs F and the estate of Mr F's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F and the estate of Mr F to accept or reject my decision before 4 April 2025.

Fiona Mallinson
Ombudsman